

# ARIZONA

## REAL ESTATE BULLETIN

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### ADEQ to require presale inspection of some septic systems beginning 1/1/02

The first stage of an Arizona program requiring inspection of septic tank systems and alternative on-site systems on a property at the time of its sale begins on January 1, 2002. "This program will roll out in two stages to provide an orderly scale up of inspection activity," said Chuck Graf, Water Quality Division Deputy Director of the Arizona Department of Environmental Quality (ADEQ).

Starting January 1, 2002, presale inspections under the new program will be required on all on-site wastewater treatment facilities approved by ADEQ or a delegated county on or after January 1,

2001. On-site wastewater treatment facilities include conventional septic tank and leach field systems as well as alternative on-site systems, usually installed on a property when a conventional system cannot be installed due to adverse site conditions. "These are the systems approved under ADEQ's new Type 4 General Aquifer Protection Permit regulations, which became effective in early 2001," said Mr. Graf. About 10,000 systems were approved in Arizona under the new regulations during 2001. Sale of any of these properties on or after Janu-

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### 'Price opinion' or 'opinion of value' fees can be illegal

It is not uncommon for a lender, relocation company or foreclosure service to offer an Arizona real estate agent a fee to provide a "BOV" (Broker Opinion of Value) or "BPO" (Broker Price Opinion) on a certain piece of property.

Ed Logan, Executive Director of the Arizona Board of Appraisal, says acceptance of the fee, in the absence of a prospective sale or listing, is a violation of Arizona Revised Statutes.

He explained the Board's position this way:

1. A.R.S. §§ 32-3601 and 32-3602 permit a real estate licensee to "give an opinion as to the price of real estate for the purpose of prospective listing or sale if this opinion is not referred to as an appraisal."

2. A.R.S. § 32-3603(B) states, "No person other than a state licensed or state certified appraiser may receive a fee for a real estate appraisal or an appraisal review." If the licensee charges a fee for a Broker Price Opinion or Broker Opinion of Value and has no prospect of a listing or sale, the opinion violates A.R.S. § 32-3603(B).

The Department of Real Estate agrees with the Arizona Board of Appraisal position and will be working with the Arizona Board of Appraisal and the Department of Banking to appraise both real estate licensees and firms offering fees for such valuations that payment of the fee in the absence of a prospective sale or listing is a violation of statutes

### New homes need professional inspection before move-in

How many home buyers know that the most important time to enlist the services of a home inspector is before escrow closes on a *new* home? Probably very few.

Many home buyers never think of having a new home inspected. They assume because the home is brand new, city or county inspectors and the builder will have found any problems and rectified them before the home is ready for the buyer to move in.

Many people close escrow without having the home inspected, but the cost of the inspection is virtually nothing when compared to the price of the home.

Very few homes are absolutely free of defects, regardless of the quality of construction or reputation of the builder. Some problems surface only years later when the property is offered for sale and the seller or buyer has the home inspected. The one-year guarantee has expired, the two-year deadline to file a complaint with the Registrar of Contractors has passed, and the seller is stuck with repair costs.

It's hard to believe, but according to Stephen Drollinger, Sr. Deputy Director of the Arizona Registrar of Contractors, many city and county building departments will issue a building permit to a contractor without checking to see whether the contractor's license is in good standing with the Registrar of Contractors. As a result, some contractors with suspended or revoked licenses or who submit license numbers belonging to other contractors end up constructing new homes.

How can a home buyer check to see whether a contractor is properly licensed? You can find out by visiting the Arizona Registrar of Contractors' web site at <http://www.rc.state.az.us> and clicking on "Check a Contractor's License." Those without web access may phone the Registrar of Contractors at (602) 542-1525. You may determine if any complaints have been filed against the contractor, current license status, and the "qualifying party" to whom the license was issued. Make sure the qualifying party contractually responsible

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Visit the Department's web site  
[www.re.state.az.us](http://www.re.state.az.us)  
where you'll find a wealth of  
information of interest to  
real estate professionals  
and consumers.

# Managing property-management trust accounts

by Michael T. Denious

Property management firms are regulated by the Arizona Department of Real Estate pursuant to A.R.S. §§ 32-2171 *et seq.* A property management firm is defined under statute as either a licensed entity broker<sup>1</sup> or a designated broker that, by written agreement, manages rental property or properties for compensation. A.R.S. § 32-2171 (l).

Among other things, property management firms are required to maintain a property management trust account, which are subject to periodic inspections or audits by the Department.

Property management trust accounts are required for all "owners' monies," unless the firm deposits such monies directly into the owner's account as directed by the owner. A.R.S. § 32-2174(B).<sup>2</sup> Owners' monies include all rents and security deposits collected with respect to the owner's property. Such monies must be deposited in the trust account or owner's account within three banking days of receipt. A.R.S. § 32-2174(D)<sup>2</sup>

A property management trust account is, indeed, a trust account, and must be handled accordingly. It must be distinct and separate from the general operating account or accounts the firm maintains in the course of its business. It should be expressly identified, in its title, as a "trust account" or "fiduciary account" or similar designation. A.R.S. § 32-2174(A) (1 - 2). Only the broker and a person (licensed or unlicensed) in the broker's direct employ may have access or be a signatory on the trust account. A.R.S. § 32-2174(C). Upon opening, closing, or relocating a trust account, the firm must advise the Department within ten days by filing a Change Form.

A.A.C. R4-28-303(E) (2) (c).

In addition to the property management statutes, the general trust account requirements under A.R.S. § 32-2151 apply. That statute provides, in part:

1. The broker shall make deposits to trust fund accounts by deposit slips. Receipts or other documentation shall identify each transaction, the date and the amount of each deposit and the names of parties involved in the transaction represented by the deposit and monies shall be used only for the purpose for which the monies

were deposited.

2. The broker shall retain a complete record of all monies received in connection with a real estate transaction in the main or branch office of the designated broker. A broker's records shall be kept according to generally accepted accounting principles *and shall include a properly descriptive receipts and disbursement journal and client ledger.... The broker shall maintain a trust fund account bank reconciliation and client ledger balance on a monthly basis* and shall remove any interest earned on a trust fund account at least once every twelve months. A broker shall not permit advance payment of monies belonging to others to be deposited in the broker's personal account or to be commingled with personal monies.... A.R.S. § 32-2151 (B) (1-2). (*Emphasis added.*)

## Accounting and Disposition of Trust Monies

As the foregoing statute requires, and as is the case for any trust account, trust monies may be used only for the purpose for which they were deposited. See A.R.S. § 32-2151 (13) (l). Commingling of broker's monies or other monies with trust monies is impermissible.<sup>4</sup> See A.R.S. § 32-215 1 (13) (2), (D).<sup>5</sup>

Ordinarily permissible distributions from the property management trust account include:

- Payments to owners (rental proceeds);
- Refunds of security deposits to tenants (within fourteen business days of termination of a residential tenancy, A.R.S. § 33-1321(D));
- Payments for work or repairs to the property, if authorized;
- Payments for utilities, taxes, or mortgage payments, if authorized;
- Payments to the firm for its management fee, where not in dispute.

Examples of misuse or commingling of funds include:

- Owner's monies are deposited to any account or source other, than the property management trust account or the owner's account, A.R.S. § 32-2174(B);
- Monies belonging to the broker are deposited in the trust account (except for a deposit not exceeding five hundred dollars at the time of estab-

lishing the trust account). A.R.S. § 32-2151 (B) (2);

- Payments from the trust account on behalf of an owner in excess of the funds actually available for the owner.

The last example above is not an uncommon one. Where a firm pays for maintenance or repairs, or refunds a tenant deposit, out of the trust account in excess of the funds available for the property owner, the firm is "borrowing" money from the trust account to make up the shortfall. Such "borrowing" is, in reality, using money of another, client or clients, held in trust for that client or clients, on behalf of one who is not entitled to the money. This constitutes the use of trust monies for a purpose other than for which the monies are intended, contrary to A.R.S. § 32-2151 (B) (1).

Ample opportunities for misusing trust monies exist due to the significant time lag between receipt of monies such as rent or deposits, and disbursement of owners' proceeds or refund of deposits. Tenant deposits, for example, typically consist of several hundreds of dollars each, and sit unused in the trust account for a year or longer. Firms should ensure that the individual client ledgers reflect the true amount of money available for each client, so as to avoid inadvertently "borrowing" trust monies. Firms may also consider creating separate trust accounts for tenant deposits, and/or an operating reserve for repairs or maintenance<sup>6</sup> for the same reason. Where all such monies are combined in the trust account, the possibility for misuse is at its greatest.

Further, firms should refrain from withdrawing cash from the trust account, as opposed to writing a check, even where the cash withdrawn is used for a completely legitimate purpose (i.e., management fees or payment for repairs). A cash withdrawal leaves a "question mark" regarding the purpose for which the funds were used. For similar reasons, firms should refrain from transferring any monies from the trust account to the operating account or other account en route to another account or payee, even where that final destination is completely legitimate.

## Record Keeping

Maintaining a proper receipts and disbursement journal (the checkbook),

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Jerry Holt

## News From The Commissioner

### Sunrise, Sunset

Every 10 years, the Legislature is required conduct a "sunset review" to determine whether the Department of Real Estate, among other agencies, should stay in business. I'm glad to report that the Joint Committee of Reference, Senators and Representatives who make that recommendation on November 29, 2001, voted 6-0 with two members absent for the Department to stay in business until at least July 1, 2012.

Among other things, the Committee considered the Auditor General's report on the operation of the Department. The report recommended several changes in the way we do business. We agreed with most, but disagreed totally with two others.

The Auditor General recommended that we create and employ Disciplinary Guidelines that include consideration of the severity of a licensee's violation of statute or rule. Although such factors have always been considered in imposing discipline, the Department has not heretofore had written disciplinary guidelines. After due deliberation, we have determined that we can develop such guidelines without compromising the outcome of disciplinary actions. The Office of Excellence in Government is conducting best practices research on the use and types of guidelines and we will adopt guidelines reflecting the best policy.

At the recommendation of the Auditor General we have modified our procedures regarding handling of complaints. We have thoroughly retrained our customer services representatives to listen carefully

to a caller's entire complaint before concluding and advising the caller that the matter does not appear to be within the Department's jurisdiction.

If the matter does appear to be within our jurisdiction, we mail out a complaint form and assist the caller with any questions they may have in completing the form.

We have revised our complaint form to clarify that the department has jurisdiction in contract disputes, ethical issues and deposits and refunds, but only when those issues rise to the level of fraud, misrepresentation or negligence.

Of all the Auditor General's recommendations, we have a concern with only two of them. It was recommended that we have specific guidelines for our investigators. All of our investigators have received extensive training and have been certified by the Council of Licensure, Enforcement and Regulation. In my opinion, an investigator who has been properly trained does not need specific steps to follow in conducting an investigation. We are concerned that an investigator's failure to strictly and absolutely adhere to a set of written procedures could result in dismissal of an otherwise solid case.

Our other concern is the recommendation that the Department "should strengthen its public information policies to direct staff to provide all public information to consumers over the telephone, including information on the number and nature of closed, dismissed and pending complaints and disciplinary actions."

We are in the process of imple-

menting this recommendation with the exception of pending, or open investigations. We disagree with giving out information on open investigations. First, our system of jurisprudence presumes innocence, and secondly, disclosure of the existence and nature of a pending investigation could significantly hinder investigative efforts.

I am proud of our accomplishments over the past 11 fiscal years. To name a few:

- There has been only an 11 percent increase in total operating expenses over 11 fiscal years. If you consider inflation, we are actually operating at a much lower budget now than in 1991.

- We have procured one of the best computer systems in the state. In 1991 we were manually processing licenses and the turn around time was two to three weeks.

Today, in most cases, we issue the license on the same day the application is submitted.

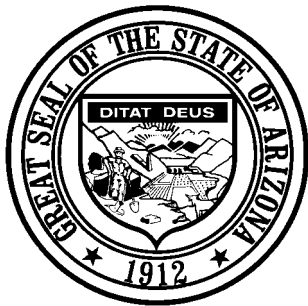
- We have reduced the amount of time required to issue a Subdivision Public Report from four months to 35 days.

- We have without question one of the very best web sites of any state agency in Arizona.

- We are producing a much higher quality product today than in 1991 with a reduction in force of nearly 12 percent.

We don't profess to be perfect, but we have improved our performance and it is my commitment to continue making positive improvements in the future.

Have a great holiday season and a really prosperous New Year. My goal for 2002 is to stay out of hospitals. Wish me luck!



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### Are Arizona real estate license fees too steep?

Next time you open your checkbook to pay your license renewal fee, be thankful you live in Arizona.

It costs Arizona real estate licensees \$125 to renew a two-year brokers license. In Texas, the cost is \$504 per year!

Connecticut will charge you \$450 for an original broker's license (\$169 in Arizona) and \$300 to renew it (\$125 in Arizona). An original salesperson's license is \$225 in Connecticut (\$94 in Arizona) and the renewal fee is \$225 per year compared to Arizona's \$60 every two years.

Arizona's license fees have remained unchanged since March, 1989. According to data compiled by the Association of Real Estate License Law Officials, between 1990 and 2000 Arizona's original salesperson license fee has dropped from 24th to 36th place among the 50 states, and salesperson's renewal fees have dropped from 20th to 35th place. Arizona's original broker's licensee fee has dropped from 16th to 22nd place while the broker renewal fee dropped from 13th to 23rd place.

### Why did you receive this issue of the *Bulletin*?

The *Arizona Real Estate Bulletin* is published six times a year. The December issue is mailed free of charge to all active and inactive real estate licensees. This issue was mailed to 47,525 people. Budget restraints preclude mailing every issue of the publication to all licensees. You may view and print each issue on the web at [www.re.state.az.us](http://www.re.state.az.us) and you may purchase a subscription and have the *Bulletin* mailed to you every other month. To obtain a subscription, send a check for \$10 to:

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### 2001-2002 Law Book available

A new edition of the Arizona Real Estate Law Book is now available for purchase in our Phoenix and Tucson offices. An online version is available on the Department's web site at [www.re.state.az.us](http://www.re.state.az.us). Navigate to the Table of Contents and then to Arizona Real Estate Law Book Online.

The book fits the special seven-ring binder furnished with previous editions. The cost is \$15 for the book, \$7 for the binder (if you need one), and \$3 for shipping if you order by mail.

To order by mail, send your check for \$18 (no binder) or \$25 (book and binder) to

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The mission of the  
Arizona Department of Real Estate  
is to safeguard and promote the public interest  
through timely and capable assistance,  
fair and balanced regulation,  
and sound and effective education.

# ADMINISTRATIVE ACTIONS

## SUMMARY SUSPENSIONS

**01A-102**

**Derek Allen**  
**Tempe**

DATE OF ORDER: November 3, 2001

The Department issued Allen a real estate salesperson's license in April, 1998. The license will expire on April 30, 2002.

Allen is currently incarcerated at the Maricopa County Jail as a result of the following convictions: January 10, 2001: DUI, a class 1 misdemeanor; Endangerment, a class 6 felony; and obtaining narcotics by fraud, a class 3 felony.

The Court sentenced Allen to three months' incarceration and three years' probation each on the misdemeanor DUI conviction, the felony Endangerment conviction and the felony narcotics conviction.

VIOLATIONS: Allen disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, with the meaning of A.R.S. § 32-2153(A)(3). He did not report the convictions to the Department as required by A.A.C. R4-28-303(E)(2)(e) in violation of A.R.S. § 32-2153(A)(3). He failed to cooperate with the Department's request for additional documents regarding his arrests and convictions are required by A.R.S. § 32-2108(C), in violation of A.R.S. § 32-2153(A)(3). He has been convicted of a felony, within the meaning of A.R.S. § 32-2153(B)(2). His conduct and actions show he is not a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). He has violated federal or state law, regulations or rule that relate to real estate or securities or that involve forgery, theft, extortion, fraud, substantial misrepresentation, dishonest dealings or violence against another person...in violation of A.R.S. § 32-2153(B)(10).

FINDING that Allen has committed acts in violation of A.R.S. §§ 32-2153(A)(3), (B)(2), (B)(7), and (B)(10), under A.R.S. §§ 32-2157(B) and (C), the public welfare or safety imperatively requiring emergency action in this matter concerning the real estate salesperson's license of Allen.

IT IS ORDERED that the real estate salesperson's license of Derek Allen is hereby summarily suspended.

Respondent may request an administrative hearing to contest this action by filing a Notice of Appeal within 30 days of Respondent's receipt of this notice.

## LICENSE APPLICATIONS DENIED

**01A-050**

**Cynthia Herr**  
**Scottsdale**

DATE OF ORDER: OCTOBER 5, 2001

FINDINGS OF FACT: On January 5, 2001, Petitioner pleaded guilty to one count of aggravated assault, a class 6 undesignated offense and sentenced to three years' probation.

In April 2001, Herr submitted an application for renewal of her real estate salesperson's license. The Department denied the application and Petitioner requested an administrative hear-

ing.

The Department cannot renew the license of a person who has been convicted of a felony and is currently on probation as a result of the conviction.

Even though Petitioner's conviction is for a class 6 undesignated offense, "[t]he offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." A.R.S. § 13-702(G).

DISPOSITION: Petitioner's application denied.

**01A-091**

**Sherman Lee Gipson**  
**Scottsdale**

DATE OF DECISION: October 30, 2001.

On August 22, 2001, the Department advised Respondent that it intended to deny his application for a renewal of his real estate salesperson's license. Respondent failed to file a notice of appeal and request and administrative hearing which constituted a waiver of his right to any hearing on the matter and any other appeal right to which he was otherwise entitled.

DISPOSITION: Renewal application denied.

**01A-059**

**Vincent A. Priorello**  
**Scottsdale**

DATE OF ORDER: November 30, 2001

FINDINGS OF FACT: In his April 2001 application for a real estate salesperson's license, Petitioner disclosed a 2000 felony conviction for criminal damage for which he was on probation at the time of his license application.

VIOLATIONS: Petitioner was convicted of a felony offense and is currently on probation because of that offense. A.R.S. 32-2125(M) prohibits the Commissioner from issuing a license to a person who has been convicted of a felony offense and who is currently on probation as a result of the conviction.

DISPOSITION: Petitioner's application denied.

**01A-068**

**Farha M. Brown**  
**Goodyear**

DATE OF ORDER: November 30, 2001

FINDINGS OF FACT: In her June 2001 application for a real estate salesperson's license, Petitioner disclosed a 1996 misdemeanor conviction for "retail theft/display merchandise" in Illinois. She also disclosed a 1999 misdemeanor shoplifting conviction in Illinois.

After receiving a very positive letter from her present employer in which the employer said she has been given increasing responsibility for setting up a restaurant, managing and training new waiters and waitresses and closing down the restaurant, the Administrative Law Judge wrote, "Petitioner is to be commended for her strides towards her past behavior. While Petitioner has made progress towards changing, there is insufficient proof at this point which would show that petitioner has become a person of good character...Petitioner has presented no evidence that the job which she presently

holds has placed her in a position of being entrusted with handling money or other fiduciary duties. She has presented no other evidence that she has undergone counseling, training, or undertaken any type of rehabilitative measures."

VIOLATIONS: Petitioner has been convicted of a crime of felony or any crime of forgery, theft, extortion, conspiracy to defraud, or a crime of moral turpitude, in violation of A.R.S. § 32-2153(B)(2). She has been found guilty of conduct which constitutes fraud or dishonest dealings, in violation of A.R.S. § 32-2153(B)(5). She has failed to show she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: Petitioner's license application denied.

**01A-073**

**John Michael Frick**  
**Phoenix**

DATE OF ORDER: November 30, 2001

FINDINGS OF FACT: In his May 30, 2001 application for a real estate salesperson's license, Petitioner disclosed that he had entered into a Consent Order with the Arizona Corporation Commission that, among other things, restricted his ability to sell securities within or from the State of Arizona, required him and his marital community to pay restitution to the Commission's securities division in the amount of \$45,000, and required him and his marital community to pay an administrative penalty in the amount of \$5,000.

The Administrative Law Judge found that the existence of these circumstances cast a cloud over Frick's application under A.R.S. § 32-2153(B)(7) and shift the burden to Frick to demonstrate that he is a person of honesty, truthfulness and good character. The Judge wrote, "No probative evidence of such honesty, truthfulness and good character exists in the record of this matter, and therefore the Department's decision to deny Frick's application should be affirmed."

DISPOSITION: Petitioner's application denied.

## REVOCATIONS

**01A-021**

**William G. Nix**  
**Phoenix**

DATE OF ORDER: October 5, 2001

FINDINGS OF FACT: In his June 1998 application for a real estate salesperson's license, Respondent failed to disclose a 1991 conviction for criminal simulation, and further that he was the subject of a permanent injunction that had been entered against him in 1997 prohibiting him from receiving, directly or indirectly, any remuneration, compensation, fees or benefit of any sort (except for personal use) from, or as a result of, any transaction relating in any way to motor vehicles or the financing or leasing of motor vehicles.

VIOLATIONS: Respondent violated A.R.S. § 32-

*Continued on page 6*

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2153(B)(1), (B)(2), (B)(3), (B)(5), (B)(7) and (B)(10).

Disposition: Respondent real estate salesperson's license is revoked. Respondent to pay a civil penalty in the amount of \$2,000.

## CONSENT ORDERS

### 01A-072

**Bernard E. Bajoras**  
**Mesa**

DATE OF ORDER: September 27, 2001

FINDINGS OF FACT: In his May 25, 2001 application for renewal of his real estate broker's license, he disclosed a January 2001 conviction for Aggravated DUI, a class 6 undesignated offense.

VIOLATIONS: Petitioner has not shown that he is a person of good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Bajoras a two-year provisional real estate broker's license effective upon entry of this Consent Order. Bajoras shall comply with the following terms and conditions during all periods of active and inactive status:

Petitioner shall abstain completely from the use of any alcohol, illegal drugs, or controlled substances unless taken under a valid prescription and orders of a medical doctor.

Effective upon the entry of this Order, Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

Prior to the issuance of the provisional broker's license, Petitioner shall submit to the Compliance Officer, for pre-approval, the name of a person selected to function as a sobriety monitor, which monitor shall agree in writing to such selection and its attendant responsibilities.

Petitioner shall enter into a contract with the sobriety monitor for his attendance at Alcoholics and/or Narcotics Anonymous meetings with a minimum attendance of one meeting per week. The sobriety monitor shall be responsible for reporting any breach of the sobriety contract to the Compliance Officer and may be periodically called upon by the Compliance Officer to report on Bajoras' attendance at such meeting and his behavior or activities.

### 01A-083

**Marvin R. Arrowood**  
**Garden City, Mich.**

DATE OF ORDER: October 2, 2001

FINDINGS OF FACT: In his June 7, 2001 application for a real estate salesperson's license, Petitioner disclosed a 1980 convictions for Possession of Marijuana and DUI; a 1981 conviction for Invasion of Privacy; 1988 convictions for Driving While License Suspended and Failure to Appear on Unpaid Traffic Tickets, Disorderly Conduct and Assault and Battery; a 1989 conviction for Impaired Driving; and a 1991 conviction for Embezzlement. All convictions were in the state of Michigan.

VIOLATIONS: Petitioner has been convicted of a crime of theft, in violation of A.R.S. § 32-

2153(B)(2). He has not shown that he is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). He violated Michigan state laws that involve theft and violence against another person in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Consent Order. He shall comply with the following terms and conditions during all period of active and inactive status:

Petitioner shall abstain completely from the use of any alcohol, illegal drugs, or controlled substances unless taken under a valid prescription and orders of a medical doctor.

Effective upon the entry of this Order, Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. Every two months, the practice monitor shall submit written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

Prior to license activation, Petitioner shall post a surety bond pursuant to A.R.S. § 32-2193.02 in the amount of \$5,000 and shall run for a period of not less than two years.

### 01A-077

**Donald D. McKenzie**  
**Surprise**

DATE OF ORDER: October 2, 2001

FINDINGS OF FACT: In his June 11, 2001 application for a real estate salesperson's license, Petitioner disclosed that the State of Washington had revoked his real estate broker's license for three years in June 1986. The State of Washington found that Petitioner had converted \$100 in earnest money to his own use; that he did not deposit the money in his trust account; that he did not maintain an individual client's ledger sheet; and that he did not maintain his real estate trust account equal at all times to the outstanding trust liability to clients.

Petitioner provided certified documentation to the Department that showed he held a State of Washington gambling license and liquor license, and that no actions had ever been taken against the license.

The Washington Order is remote; and, at this time, the Department has no reason to believe that Petitioner has any criminal convictions or that any other civil or administrative judgments or orders have been entered against him. Petitioner was sincerely remorseful and regretted his decisions that resulted in the Washington Order.

VIOLATIONS: Petitioner's conduct that resulted in the Washington Order does not show that he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7). He has violated Washington state

laws that relate to real estate in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Order. Petitioner shall comply with the following terms and conditions:

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. Every two months, the practice monitor shall submit written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

### 01A-099

**Jasper Henry Lanza**  
**Tempe**

DATE OF ORDER: October 5, 2001

FINDINGS OF FACT: In his July 2001 application for a real estate salesperson's license, Petitioner disclosed 1999 convictions in Oklahoma for Delivery of Controlled Drug, a felony, and Unlawful Possession of Marijuana with intent to distribute, a felony.

He was sentenced to prison for 10 years on each count to be served concurrently, with seven years suspended, and to remain on supervised probation for the seven-year balance of the sentence. He was discharged from probation in March 1998.

VIOLATIONS: Petitioner has been convicted of a felony, in violation of A.R.S. § 32-2153(B)(2). He failed to demonstrate that he is a person of good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Consent Order. Petitioner shall comply with the following terms and conditions during all period of active and inactive status:

Petitioner shall abstain completely from the use of any alcohol, illegal drugs, or controlled substances unless taken under a valid prescription and orders of a medical doctor.

Effective upon the entry of this Order, Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

**01A-016****Jeffrey J. Holt  
Gilbert**

DATE OF ORDER: October 5, 2001

FINDINGS OF FACT: Respondent was issued an original real estate broker's license in October 1999,

On September 1, 2000, Respondent notified the Department that he had been convicted of a felony in Riverside County, Calif.

On August 25, 2000, Riverside County Superior Court entered an Order convicting Respondent: While in his official capacity as a member of the Legislature, state, county, district, judicial district and a city officer or employee, did willfully and knowingly become financially interested in a contract made by him in his official capacity, a felony.

The Court suspended imposition of sentence and placed Respondent on supervised probation for three years. He is currently on felony probation and will remain on probation until August 25, 2003.

VIOLATIONS: Respondent has been convicted of a felony, in violation of A.R.S. § 32-2153(B)(2). Respondent has been found guilty of conduct that constitutes dishonest dealings, in violation of A.R.S. § 32-2153(B)(5). By his conduct, Respondent has shown that he is not a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate broker's license is revoked upon entry of this Order. Respondent may reapply for a real estate broker's license two years after entry of this Order.

**01A-092****Dianne C. Shestko, formerly known as  
Dianne Beluardo  
Phoenix**

DATE OF ORDER: October 13, 2001

FINDINGS OF FACT: In her July 9, 2001 application for a real estate salesperson's license, Petitioner disclosed a 1989 conviction for Misdemeanor Larceny. She was sentenced to unsupervised probation for three years,

Petitioner is sincerely remorseful and regrets her decision that resulted in the conviction. The Department has no reason to believe she has any criminal convictions or that any other civil or administrative judgments have been entered against her since the conviction referenced above.

VIOLATIONS: Petitioner has been convicted of a crime of theft and/or a crime of moral turpitude or any other like offense, in violation of A.R.S. § 32-2153(B)(3). She has not shown she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). She violated North Carolina state laws that involve theft, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive licensure:

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the

broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. Every two months, the practice monitor shall submit written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

Prior to license activation, Petitioner shall post a surety bond in the amount of \$3,500.

**01A-122****Anna S. Wolff  
Paradise Valley**

DATE OF ORDER: October 13, 2001

FINDINGS OF FACT: In her August 30, 2002 application for a real estate salesperson's license, Petitioner disclosed a 1999 Arizona misdemeanor conviction for which she was sentenced to one year's probation, and an April 2001 conviction for Assault/Domestic Violence, a class 1 misdemeanor.

Petitioner has demonstrated remorse for her role in the incidents listed above and has accepted responsibility for her actions. She is currently completing 16 counseling sessions in a Domestic Non-Violence Program order by the Court. Her probation officer intends to petition for early release from probation.

VIOLATIONS: Petitioner's conduct does not show she is a person of good character within the meaning of A.R.S. § 32-2153(B)(7). Her convictions constitute crimes of violence against another person within the meaning of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Department shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Order. She shall comply with the following terms and conditions during all periods of active licensure:

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. Every two months, the practice monitor shall submit written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

**01A-089****Taylor K. Sitts  
Flagstaff**

DATE OF ORDER: October 16, 2001

FINDINGS OF FACT: In his August 2001 application for a real estate salesperson's license, Petitioner disclosed a 1999 conviction for obscene conduct, a 1995 conviction for contributing to a minor, and 1991 convictions for minor in possession of alcohol, shoplifting and minor consuming alcohol.

Petitioner has not been convicted of a felony, did not serve any jail time for previous convictions, and complied with the terms of his sentencing and fines. He was less than 25 years of age at the time of each violation, except for

the 1999 conviction.

He was candid about his previous conduct, accepts responsibility for his behavior, and sincerely expressed his remorse for engaging in the conduct that led to his convictions. VIOLATIONS: Petitioner has failed to demonstrate that he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Consent Order. He shall comply with the following terms and conditions during all period of active and inactive status:

Petitioner shall abstain completely from the use of any alcohol, illegal drugs, or controlled substances unless taken under a valid prescription and orders of a medical doctor.

Effective upon the entry of this Order, Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

**01A-067****Sherry Lynn Wildon, aka Sherry Lynn Waller  
Phoenix**

DATE OF ORDER: October 30, 2001

FINDINGS OF FACT: In her July 2001 application for a real estate salesperson's license, Petitioner disclosed a conviction for Attempted Theft, a class 4 felony.

The Court suspended imposition of sentence and placed Petitioner on probation for two years.

Petitioner appeared remorseful and regretted her decision that resulted in the conviction. The Department has no reason to believe that she has any criminal convictions or any other civil or administrative judgments have been entered against her since the 1985 conviction referenced above.

VIOLATIONS: Petitioner has been convicted of a crime of theft and/or a crime of moral turpitude, or any like offense, in violation of A.R.S. § 32-2153(B)(2). She has not shown she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). She has violated Arizona state laws that involve theft, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license upon entry of this Consent Order. She shall comply with the following terms and conditions during all period of active and inactive status:

Prior to license application, each designated broker shall file with the Compliance

*Continued on page 8*

Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. Every two months the practice monitor shall submit written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

Petitioner shall post a surety bond in the amount of \$2,500. The bond shall run for a period not less than two years.

#### 01A-024

**Colette A. Barajas**  
Tucson

DATE OF ORDER: October 17, 2001

FINDINGS OF FACT: Respondent was issued an original real estate broker's license in May 1998. On January 24, 2001, she notified the Department that she had been convicted of a felony in Maricopa Superior Court.

She was convicted on January 12, 2001, of Attempted Fraudulent Schemes and Practices, a class 6 felony. The court suspended imposition of sentence and placed Respondent on supervised probation for three years.

As partial terms of the probation, the Court order Respondent to pay a financial assessment of \$2,430 and to complete 40 hours of community service.

Respondent was discharged from probation on February 21, 2001. On April 10, 2001, the Court entered an Order granting Respondent's Application for Setting Aside Judgment of Conviction and Guilty Plea and Dismissal of Indictment.

Respondent is sincerely remorseful and regretted her poor judgment that resulted in the conviction. She paid the financial assessments in full, complete court-ordered community service hours and was discharged from her probation in a very short time.

VIOLATIONS: Respondent has been convicted of a felony, in violation of A.R.S. § 32-2153(B)(2). She has been found guilty of conduct that constitutes dishonest dealings, in violation of A.R.S. § 32-2153(B)(5). She has shown that she is not a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). She violated Arizona state laws that involve dishonest dealings, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: Respondent's real estate broker's license for 30 days. Respondent to pay a civil penalty in the amount of \$1,000.

#### 01A-120

**Heather Coleen Heiligenthal, formerly known as Heather Lohrenz**  
Yuma

DATE OF ORDER: November 1, 2001

FINDINGS OF FACT: In her August 2001 application for a real estate salesperson's license, Petitioner disclosed a 1996 conviction for theft, a misdemeanor. She was sentenced to 10 days in jail with 10 days suspended and was placed on probation for one year.

Petitioner was young at the time, appeared remorseful, and regretted her decision that re-

sulted in the conviction. She has submitted to the Department letters of recommendation from two association brokers who attest to her good character and trustworthiness. The Department has no reason to believe that Petitioner has had any criminal convictions or any other civil or administrative judgments entered against her since the conviction referenced above.

VIOLATIONS: Petitioner has been convicted of a crime of theft and/or a crime of moral turpitude or any other like offense, in violation of A.R.S. § 32-2153(B)(2). She has not shown that she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7). She violated Arizona laws that involve theft, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license. Petitioner shall comply with the following terms and conditions during all periods of active and inactive status:

Prior to license application, each designated broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

Prior to license activation, Petitioner shall post a surety bond in the amount of \$2,500. The bond shall run for a period of not less than two years.

#### 01A-123

**KB Home Sales**  
Phoenix

DATE OF ORDER: November 15, 2001

FINDINGS OF FACT: On February 15, 2001, a Special Order of Exemption was issued to KB Home Sales authorizing the conditional sale of Lots 1-355.

On May 1, 2001, an Arizona Subdivision Public Report was issued to KB Home Sales for Lots 273-299, 312-325 and 328-340 in Arizona Brisas Phase Three. The public report did not include all of the lots included in the exemption; the remainder of the lots were to be included in a later application for amended public report.

From May 1, 2001, to present, KB Home Sales sold and closed escrow on Lots 232, 233, 248, 250, 251, 256, 263, 271, 298, 304, 326 and 327, Arizona Brisas Phase Three, without first obtaining an amended public report authorizing the sale of these 12 lots.

In explanation and mitigation, KB Home Sales states that:

A. At the time of the sale and closing of escrow of the referenced unregistered lots, KB Home Sales had not determined that the 12 lots sold were not included in the public report.

B. Upon learning that the sale of these 12 lots were not included in the public report, KB Home Sales immediately brought this fact to the Department's attention and discontinued further sales of lots not included in the public report; and C. After notification to the Department of these

unauthorized sales, KB Home Sales immediately began the process to amend and has prior to the date of this Consent Order submitted to the Department an amendment to the public report to include, without limitation, all of the referenced 12 lots.

VIOLATIONS: KB Home Sales failed to apply for and secure an amended public report covering the referenced 12 lots prior to their sale in violation of A.R.S. §§ 32-2818(A), 32-2183(F), 32-2184(A), and A.A.C. R4-28-B1203.

DISPOSITION: KB Home Sales to pay a civil penalty in the amount of \$10,000. KB Home Sales shall acquire an amended public report from the Department covering, in part, the referenced 12 lots and any additional lots to be sold prior to further sales of lots not specifically authorized in the existing public report. KB Home Sales shall provide evidence to the Department that it has notified all purchasers of the referenced 12 lots of their right to rescission substantially in the form attached.

#### 01A-096

**Taffy A. Parker, formerly known as Taffy Ann Inlow**  
Glendale

DATE OF ORDER: November 19, 2001

FINDINGS OF FACT: In her July 2001 application for a real estate salesperson's license, Petitioner disclosed that on May 11, 1993 she had pleaded no contest to a charge of Child Abuse. The court accepted the plea and entered an order deferring entry of the judgment of and placed her on probation for four years. Petitioner was discharged from probation on May 12, 1997.

Petitioner has provided the Department with documents showing she has obtained permanent custody of her minor children. The incident referenced above is more than eight years old, and the Department has no reason to believe that Petitioner has any criminal convictions entered against her.

VIOLATIONS: Petitioner has not shown she is a person of honesty, truthfulness and good character, in violation of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive licensure:

Prior to Petitioner's license activation, each designated broker shall file with the Compliance Office a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer that attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

#### 01A-119

**Barbara M. Nichols**  
Sun City

DATE OF ORDER: November 19, 2001

FINDINGS OF FACT: In her August 2001 application for a real estate broker's license, Petitioner

disclosed that her California real estate license had been revoked, with a right to restricted license, for one year. In September 1999, the California Department of Real Estate entered an order granting reinstatement of Petitioner's license.

The events referenced above occurred more than six years ago. Petitioner was never formally convicted of the conduct and actions referenced above. She submitted several reference letters to the Department in support of her obtaining an Arizona real estate broker's license. VIOLATIONS: Petitioner violated California state laws that relate to real estate, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate broker's license upon entry of this Order. Petitioner shall comply with the following terms and conditions during all periods of active and inactive licensure: 1. Prior to Petitioner's license activation, each designated broker shall file with the Compliance Office a signed statement certifying that the broker has received a copy of this Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer that attest to

Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct that violates real estate statutes or rules.

2. Petitioner may not act as a self-employed broker nor employ other licensees.
3. Petitioner may not act as a designated broker.
4. Petitioner may only act as an associate broker.

#### 00A-130

**Alex Mogo**  
**Scottsdale**

DATE OF ORDER: November 26, 2001

FINDINGS OF FACT: The Department notified Petitioner that it intended to deny his August 21, 2001 application for renewal of his real estate salesperson's license. Petitioner appealed the decision and entered into this Consent Order.

At all material times, Petitioner was employed by The Profit Task Force, Inc., dba Century 21 Solutions. The designated broker was Edmund Gornay.

In April 1999, Norman and Betty Organ contacted real estate salesperson Jean Jajou to purchase a mobile home in Glendale. They in-

formed Jajou that they were interested in a 1980 model or newer because their lender required the mobile home to be a 1978 model or newer.

Jajou searched the MLS and found a home listed by Petitioner as a 1992 model. The Organs purchased the home and two months after close of escrow discovered it was a 1972 model.

Petitioner states he prepared the handwritten MLS residential profile sheet, accurately indicating a 1972 model, but a clerical employee inadvertently entered the model year as 1992. Petitioner should have reviewed the listing after it was entered in the MLS.

VIOLATIONS: Petitioner disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, and Commissioner's Rules in violation of A.R.S. § 32-2153(A)(3). He demonstrated negligence in performing acts for which a license is required in violation of A.R.S. § 32-2153(A)(22). He failed to ensure that all advertising contained accurate claims and representations as required by A.A.C. R4-28-502(C).

DISPOSITION: Petitioner is assessed a civil penalty in the amount of \$1,000 and shall take nine hours of approved continuing education in addition to hours required for license renewal.

## Trust accounts

*Continued from page 2*

and individual client ledgers, reconciled on a monthly basis, is mandatory. A.R.S. § 32-2151(B)(2). The broker whose records do not comply with the latter requirements runs the risk of inadvertently commingling or misusing trust account funds, or worse, failing to detect mismanagement or embezzlement by another.

In addition, records pertaining to trust accounts, including "all financial records" such as "bank statements, canceled checks, deposit slips, bank receipts, receipts and disbursement journals, owner statements, client ledgers, and applicable bills, invoices and statements," must be kept for at least three years from the date each record is executed. A.R.S. § 32-2175(C). This is in contrast to the record-keeping requirements for residential rental agreements and related documents, which need only be kept for one year after expiration thereof, or until returned to the owner upon termination of the agreement (and may be kept either on-site or at an appropriate off-site storage location). A.R.S. § 32-2175(A).

Canceled checks need not be kept in original form; bank generated check images are an acceptable alternative under A.R.S. § 32-2175(C), in recognition of the check truncation practices presently being utilized by many banks, pursuant to which such institutions

maintain electronically stored images of canceled checks and dispose of the originals. The Department first permitted the use of check images in a substantive policy statement, since repealed, which provided that check images were an acceptable alternative to original canceled checks. See Subst. Pol. Stat. 21 (July 7, 1999, repealed August 9, 2001). Firms must obtain copies of such check images from their banks and keep them pursuant to normal record-keeping requirements.

Computerized records are permissible, however, they must be kept in a manner "allowing reconstruction in the event of destruction of electronic data." A.R.S. § 32-2151(B)(2). In implementing this requirement, the Department has issued Substantive Policy Statement No. 24, "Electronic Record Keeping," effective August 15, 2000. The Statement addresses the specific requirements to be met where records are kept by electronic data. In addition to the requirement for reconstructability in the event of destruction, such records must be able to be produced, at the broker's expense, in legible written form upon the Department's request, and must be exact duplicates of the originals. *Id.*

#### End Notes

<sup>1</sup>An entity broker is a corporation, partnership or limited liability company licensed pursuant to A.R.S. § 32-2125(A).

<sup>2</sup>Where the firm deposits monies directly

into an owner's account, the firm shall not have access to such account. A.R.S. § 32-2174(B).

<sup>3</sup>A banking day is any day on which the bank is open for business pursuant to A.R.S. § 6-241.

<sup>4</sup>"Commingling" generally means the combining of separate monies or property into one common fund..." BLACK'S LAW DICTIONARY at 271 (6th ed. 1990).

<sup>5</sup>A.R.S. § 32-2151(B)(2) states, in part, that a broker "shall not permit advance payment of monies belonging to others to be deposited in the broker's personal account or to be commingled with personal monies." A.R.S. § 32-2151(D) further provides that a broker may not "commingle monies entrusted to the broker with the broker's own monies, unless the commissioner adopts rules that allow commingling."

<sup>6</sup>Where the company creates a separate reserve account or "operating reserve," its existence, purpose, and amount of money held must be specified in the property, management agreement.

A.R.S. § 32-2173(A)(1)(g).

*Mr. Denious is an associate with the law firm of Stoops & Klobardanz, PLC, and practices general real estate litigation. Prior to joining Stoops & Klobardanz, Mr. Denious was an Assistant Attorney General with the Arizona Attorney General's Office, where he represented the Arizona Department of Real Estate, the Arizona Department of Insurance, and the Arizona State Banking Department.*

# Take this quiz

## and find out why lot splitting is more art than science

by *Edwin Ricketts*

Small investors and real estate licensees who engage in lot splitting are starved for direction in how to legally split, market and sell their raw land. Keeping one's land divisions to five or fewer,<sup>1</sup> to avoid the necessity of a public report, is often more of an art than a science, and good regulatory direction in this regard is lacking. Why would someone want to "five-split" their property instead of creating a "legitimate" subdivision? Why? Because there are no costly infrastructure requirements.<sup>2</sup> And the profit margin is very attractive.<sup>3</sup>

There are many ways of directly creating or indirectly facilitating the division or sale of property that may constitute "acting in concert"<sup>4</sup> or a "common promotional plan,"<sup>5</sup> serious violations in the eyes of the Department of Real Estate that can result in license revocation, fines and an order to comply with the local entity's subdivision ordinance.<sup>6</sup> Even though recent disciplinary actions of the Department are tame compared to the actions of times past, there is still no sex appeal in getting caught in the act of illegal subdividing.<sup>7</sup>

Take the quiz and see how you do. Answers are at the end.

1. Do you now or did you ever have an ownership interest (including through an entity or as an undivided interest) in six or more lots resulting from the same "parent" (originating) parcel? Yes ☐ No ☐

2. Do you, now or have you ever had an ownership interest (including through an entity or as an undivided interest) in property contiguous to yours where the aggregate of all your land divisions, including the subject property, exceeds five? Yes ☐ No ☐

3. Do you now or did you ever exercise any control or decision making in the creation of six or more lots from the same parent parcel? Yes ☐ No ☐

4. Did you ever encourage, advise, direct or assist another in the purchase of a contiguous property that was then split, resulting in more than five land divisions when added to yours? Yes ☐ No ☐

5. Do you own or have you ever owned an interest in six or more lots or divisions thereof in an existing subdivision or unsubdivided development which you marketed or sold without a public report? Yes ☐ No ☐

6. Did you ever encourage, advise, direct or assist another in the purchase of a lot in a subdivision or unsubdivided land development that was then split, resulting in more than five land divisions when added to yours? Yes ☐ No ☐

7. Did you acquire the parcel you five-split by purchasing a larger parcel with one or more other buyers, which was then split in escrow to create the parcel you took title to and then 5-split? Yes ☐ No ☐

8. Do you own or have you ever owned an interest in property contiguous to other property you own or in which you owned an interest (including lots in a subdivision or unsubdivided development), where the total number of lots in which you played a role in creating or marketing, for all the contiguous properties, exceeds six? Yes ☐ No ☐

9. Did you sell one of your splits to a friend, business associate or relative whose splits, when added to yours, exceeds five? Yes ☐ No ☐

10. Did you purchase your property from a friend, business associate or relative whose splits, when added to yours, exceeds five? Yes ☐ No ☐

11. Did a friend, business associate or relative purchase property contiguous to yours, based on information you provided about the availability of the property, and the aggregate of your respective land divisions totals six or more? Yes ☐ No ☐

12. Did you purchase property that you split based on information provided you by a friend, business associate or friend, and the aggregate of your respective land divisions totals six or more? Yes ☐ No ☐

13. Did you drill a well on your property

to serve more than five ultimate lots created from your parcel? Yes ☐ No ☐

14. Have you, or you and other owners working together, arranged, directed or assisted in providing utilities or road improvements to serve six or more contiguous lots? Yes ☐ No ☐

15. Have you entered into a common well agreement, with contiguous landowners, that provides well interests, for more than five lots? Yes ☐ No ☐

16. Did you and a contiguous land owner market six or more of your respective lot splits through the same broker at the same time? Yes ☐ No ☐

17. Did you market your land divisions using lot releases that a purchaser could exercise to obtain marketable title to each incremental lot release of the purchase property, thus facilitating the further splitting of the property? Yes ☐ No ☐

18. As a buyer, did you utilize lot releases in seller financing to facilitate the splitting, marketing and sale of your land divisions? Yes ☐ No ☐

19. Did you work with neighboring parcel owners to create easements that would facilitate further logical division of the parcels into six or more lots? Yes ☐ No ☐

20. Did the property seller or the seller's agent advise, direct or assist you in determining how many land divisions you could get from the property you purchased (where the sum of your land divisions and the owner's exceeds five?) Yes ☐ No ☐

21. Did you advise, direct or assist a buyer to whom you sold property in determining how many land divisions the buyer could get in further splitting the property you sold the buyer (where the sum of your land divisions and the buyer's exceeds five?) Yes ☐ No ☐

22. Did you, acting individually or with other land owners, have a survey or surveys completed which evidence six

or more prospective lots to be created?

Yes ☐ No ☐

23. Did you arrange, direct or participate in any way in the deeding of property into family members' names or a controlled entity, and the aggregate of all family members' and/or the entity's splits resulted in six or more land divisions? Yes ☐ No ☐

24. As a property owner, did you negotiate the sale of a land division in the middle of your property so you could then split the remaining "non-contiguous" parcels, creating more than five land division from the parent parcel?

Yes ☐ No ☐

25. Have you ever owned and sold six or more lots or individual land divisions in an existing unsubdivided land development or subdivision, even though you never owned more than five at any one time? Yes ☐ No ☐

26. As a real estate agent, did you list six or more lots created from the same parent parcel? Yes ☐ No ☐

27. As an agent, did you put together two or more investors to purchase a large parcel, split it in escrow to allot a parcel to each of the investors, who then each further split their respective parcels, creating more than six lots in the aggregate? Yes ☐ No ☐

28. As an agent, did you advise or counsel one or more property owners how to split or market their properties, and based on your advice and counsel more than six lots were created or marketed from the same parent parcel or in the same subdivision or unsubdivided land development? Yes ☐ No ☐

29. As an agent, did you list the lots split from a parcel you previously sold to that owner, which was one of a five-split you had previously listed? Yes ☐ No ☐

30. Did you believe an action you took to split a parcel or market lots is a legal circumvention of the subdivision laws? Yes ☐ No ☐

You should have answered every question "no"

A "yes" answer to any of the questions doesn't automatically make you a class 5 felon, but your activities may be viewed with suspicion by the Department of Real Estate.

There are certainly other actions that may comprise violations. However, if you answered "no" to each of the above, the chances are good that your lot splits are legal.

Will a single "yes" answer bring the wrath of the Department of Real Estate down on your head? Not necessarily. It depends a lot on the activity to which you answered "yes." The Department may not think a single violation is sufficient to sustain its burden of proof, although the activity may still be considered a violation.

#### END NOTES

<sup>1</sup>The trigger for compliance with the subdivision laws is the definition of "subdivision." See A.R.S. § 32-2101(54).

<sup>2</sup>In splitting property for the purpose of sale or lease, as long as the number of accountable lots created is fewer than six, compliance with the subdivision development requirements of DEQ, DWR, the county or ADRE is not required. Therefore, no sewer system, no 100 year assured water supply, no paved roads and no public report are required. For instance, even if a five-split is located in an active management area, the five-splitter may stick his straw down and suck to his heart's content. The 100 year assured water supply is not triggered until the accountable splits reach six (the definition of "subdivision").

<sup>3</sup>I've seen up to a ten fold return on a five-split. Interestingly, the big subdividers have never figured out that their biggest competitors are not from

within their own ranks – it's the five-splitters.

<sup>4</sup>A.R.S. § 32-2101(1). From a practical or functional perspective, "acting in concert" means, in the eyes of ADRE, actions which, when viewed together, resulted in six or more land divisions.

<sup>5</sup>A.R.S. § 32-2101(14).

<sup>6</sup>The largest illegal subdivision action by ADRE, commonly referred to as "Section 7," cost the respondents hundreds of thousands of dollars for legal defense, civil penalties and road improvements, and several real estate licensees had their licenses suspended for two years.

<sup>7</sup>Last year, in a pretty obvious, and egregious, illegal subdivision case, a consent order settlement was entered into, providing a \$50,000 payment to the county plus a fine (totaling \$87,500, a fraction of the estimated illegal profit of \$300,000), and no licenses were suspended. Historically, a consent order settlement often included suspension of licenses.

<sup>8</sup>Illegal subdividing is a class 5 felony, although in recent years only Pima County has pursued such activities criminally. A.R.S. § 32-2165(B).

<sup>9</sup>An unsubdivided land development is six or more lots of at least 36 acres in size each. A.R.S. § 32-2101(58).

<sup>10</sup>The definition of "sale" includes "every disposition, transfer or offer or attempt to dispose of or transfer real property, or an interest, use or estate in the real property...." This includes a gift to a relative. A.R.S. § 32-2101(49).

<sup>11</sup>Try this litmus test: if the action you are contemplating is a way, in your mind, to avoid compliance with the subdivision laws, then it is probably illegal.

<sup>12</sup>However, it is extremely rare to find only one violation, and all too easy to find multiple violations. Trust me on this.

*Edwin J. Ricketts is a broker-counselor and educator. He may be reached at 602-277-4332. or EJRe-tal@fastq.com.*

## What information must be on my business card?

This question is one Department staffers hear often. The answer, provided by Commissioner's Rule R4-28-502(E) is simple:

You must show the name in which the employing broker's license is held

(John Smith, Designated Broker), or the fictitious name contained on the license certificate (Best in the West Real Estate).

The lettering used for the name of the employing broker shall appear in a

clear and conspicuous manner.

This rule must be applied to newspaper and Internet advertising as well. Personal web pages advertising your services must show the broker's name or entity name as explained above.

## Home inspections

*Continued from page 1*

for constructing your home matches the license number on the building permit.

According to Wendy Rogers of HouseMasters in Phoenix, "Real estate agents should protect themselves by recommending one or more home inspectors to their clients in order to reduce agent liability for negligent referral. If you leave the selection to the buyer, you may fall prey to a claim of nondisclosure or negligent referral if your buyer decides to go after the home inspector and then the inspector folds because he is uninsured."

How do you select a home inspector? Rogers has some suggestions:

1. Ask for proof of \$1 million in Errors and Omissions insurance, \$1 million in General Liability insurance and Worker's Compensation insurance.
2. Ask to see proof of accredited formal home inspector training to ensure that the inspector is a competent general practitioner.
3. Ask for a written guarantee on the inspection report findings. Make sure the inspector will stand behind his work for more than the cost of the inspection.
4. Does the inspector indemnify the referring real estate agent? Will your court costs be covered in case you are sued for recommending the inspector?
5. Ask whether the inspector is subject to formal and verifiable pre-employment and random drug screening.
6. Is carbon monoxide testing standard in every inspection?

A thorough home inspection should last three hours or more, says Rogers.

1. The inspector should walk the roof. If he or she didn't bring a ladder, send them away.
2. The inspector should crawl through the entire attic.
3. The inspection must include the building's structure -- flooring, walls and ceilings.
4. To properly inspect the electrical system, the inspector must remove the circuit-breaker box cover.
5. The inspection should also cover
  - Plumbing in the bathrooms, kitchen and laundry area;
  - The heating and cooling system;
  - The hot water heater;
  - Built-in appliances (do all of them actually work?);
  - Pool, spa and outdoor sprinklers if applicable;
  - Radon, asbestos or water testing if applicable.

Along with Rogers, Dan Smith of Nest Technologies is considered by experts to be among the Valley's best home inspectors. According to Smith, "City or government building inspectors are deluged with daily inspections which must be completed quickly. Most building departments have little time to thoroughly inspect each property. While inspectors look for code violations, differences between the approved blueprints and actual installations may vary greatly and seldom are checked by inspectors, much to the surprise of most home buyers."

Smith's list of items beyond the scope of city inspectors and typically not checked are:

- Windows and doors installed in the

correct locations;

- Air conditioning and heating duct work compressed, shortened or installed in locations not consistent with the mechanical engineer's recommended plan;
- Out-of-plumb walls;
- Scratched bathtubs, counter tops and window glass;
- Squeeks in wood floors or settling cracks in concrete floors;
- Incomplete drywall finishes;
- Damaged or improperly flashed roof coverings;
- Stucco cracks
- Inadequate paint coverage
- Missing wall and ceiling insulation.

Smith recommends that home buyers have new homes inspected in two steps.

The first inspection should be done after the rough framing is completed but before drywall is hung. A partial list of items that should be inspected at this time includes:

- Framing;
- Roof structure;
- Mechanical connections;
- Window and door openings;
- Fire safety issues;
- Owner selected contract options should be inspected for proper location and installation.

The final inspection should include:

- Drywall and paint defects;
- Attic insulation and duct work connections;
- Flooring, counter tops, bath areas and fixtures;
- Doors, trim and cabinetry;
- Exterior stucco and roof coverings;
- Final grading and draining.

## Septic systems

*Continued from page 1*

ary 1, 2002, will trigger the presale inspection requirement, said Mr. Graf.

Beginning on January 1, 2003, all other on-site systems will be brought into the ADEQ presale inspection program. "These are the systems constructed before January 1, 2001, which were "grandfathered" under a Type 1 General Permit according to ADEQ's new regulations," said Mr. Graf. *There are several hundred thousand of these systems in Arizona.* [Emphasis added. Ed.]

Many septic tank systems are already being inspected at the time of property sale to fulfill disclosure requirements as part of the Arizona Association of Real-

tors® standard real estate contract. However, there has been a great deal of inconsistency in the way these inspections are being performed across the state, said Mr. Graf. The new ADEQ requirement will ensure that inspections of septic tank and alternative systems are performed in a uniform manner in Arizona, and that consistent, useful information will be generated for the buyer and seller. "Of course, the key underlying reason for the inspections," said Mr. Graf, "is to prevent failure of septic tank systems, thus protecting human health and the quality of our precious surface and ground water sources."

ADEQ has developed the form [see next page] to be used for the presale inspection and notice of transfer of

ownership and a list of provider categories qualified to perform the inspections. The ADEQ rule states that a copy of the form be sent to the applicable county agency that issues septic tank construction approvals along with a fee of \$50 to cover the county's transfer of ownership costs. The form will be available in Adobe Acrobat format from the ADRE web site at [www.re.state.az.us](http://www.re.state.az.us) (go to the Table of Contents) or from the Department of Environmental Quality web site at [www.adeq.state.az.us/comm/download/water.html](http://www.adeq.state.az.us/comm/download/water.html).

Licenses should advise buyers and sellers of homes using a septic system of the requirement to have the system inspected and the requirement to file the report with the appropriate agency.

**ARIZONA ON-SITE WASTEWATER TREATMENT FACILITY  
REPORT OF INSPECTION AND NOTICE OF TRANSFER OF OWNERSHIP**

<b>A. Property Information:</b> Property Address _____ _____ _____ County _____ Tax Parcel No. _____ <input type="checkbox"/> Residential <input type="checkbox"/> Non-residential	<b>B. Date Inspection Completed:</b> _____ <b>C. Name of Current Owner/Seller/Transferor:</b> _____ _____ <b>D. Name of Buyer/Transferee:</b> _____ _____
<b>E. Type of System (see explanation on reverse for whether an inspection and notice of transfer is needed):</b> <input type="checkbox"/> Conventional septic tank and disposal system approved under General Aquifer Protection Permit (GP) 4.02 <input type="checkbox"/> Alternative on-site system (non-mechanical with gravity flow) approved under GP 4.03 through 4.22 <input type="checkbox"/> Other alternative system approved under GP 4.03 through 4.22 <input type="checkbox"/> On-site wastewater treatment facility from 3000 to less than 24,000 gallons per day approved under GP 4.23	
<b>F. Inspector's Summary:</b> 1. Were facility permit, construction and/or operational records available for the inspection? <input type="checkbox"/> Yes <input type="checkbox"/> No 2. Was septic tank pumped (recommended if more than 3 years have passed since last pumping)? <input type="checkbox"/> Yes <input type="checkbox"/> No 3. Was effluent filter cleaned? <input type="checkbox"/> Yes <input type="checkbox"/> No 4. Was there evidence of disposal field failure (sewage backup or surfacing of septic tank effluent)? <input type="checkbox"/> Yes <input type="checkbox"/> No 5. Assessment of physical and operational condition of system and identification of associated deficiencies: <input type="checkbox"/> System appears to be operating properly—no repairs are recommended. <input type="checkbox"/> Recommended actions or repairs (to extend system lifetime and prevent premature failure): _____ _____ _____ _____ <input type="checkbox"/> Critically needed actions or repairs (to remedy an imminent or existing threat to human health or the environment): _____ _____ _____ _____	
<b>G. Inspector's Certification:</b> <i>I have inspected the physical and operational condition of the on-site wastewater treatment facility serving this property on the above-indicated date. I have completed this inspection report to the best of my knowledge, basing Part F on conditions I observed at the time of inspection. However, this report does not imply nor guarantee any future performance of this system in any way.</i>  Inspector's Signature _____ Date: _____ Inspector's Name (print): _____ Phone: _____ Address: _____ _____	
<b>H. Acknowledgment of Receipt of this Inspection Report:</b>  Owner/Seller/Transferor Signature: _____ Date: _____ Buyer/Transferee Signature: _____ Date: _____	

# Provider Categories for On-Site System Inspection Services

Arizona Administrative Code (A.A.C.) R18-9-A316 requires that 1) a Transfer Inspection be performed by a person possessing "working knowledge" of the "inspection process" and the type of on-site wastewater treatment facility that serves the property to be transferred and 2) the Report of Inspection and Notice of Transfer be prepared on a form approved by the Arizona Department of Environmental Quality (ADEQ). Use of ADEQ Form A316 satisfies the latter requirement.

ADEQ believes individuals in the following provider categories typically possess appropriate knowledge and skills to perform the on-site system inspection of a conventional septic tank

and disposal field:

1. An owner of a vehicle with a Human Excreta Collection and Transportation License issued pursuant to A.A.C. R18-8-613 (a septage hauler or pumper).
2. A Grade 2 or higher Wastewater Treatment Plant Operator licensed pursuant to A.A.C. R18-5-112 through 114.
3. An Arizona Registered Sanitarian with 2 years of experience with on-site wastewater treatment facilities.
4. An Arizona-registered Professional Engineer who applies the technical knowledge and skill which would be applied by all other registrants who

practice in the field of on-site wastewater treatment facilities.

5. A Licensed Contractor pursuant to A.A.C. R4-9-103 (C-41 Residential Contracting License), R4-9-102 (L-41 Commercial Contracting License), or R4-9-104 (K-41 Dual Contracting License) who is authorized to install and repair septic tank treatment and disposal systems, septic tanks, and leach fields.

6. A person who is certified or approved as having knowledge and competence in the field of on-site wastewater treatment facilities and associated ADEQ rules.

## Information on back of ADEQ Form A316 (see page 13)

**Which on-site wastewater treatment facilities does this inspection and filing requirement apply to?** This requirement applies at the time of ownership change to any on-site wastewater treatment facility approved for use on or after January 1, 2001 by the Arizona Department of Environmental Quality (ADEQ) or a delegated county agency. [Arizona Administrative Code (A.A.C.) R18-9-A301 (D) (2) (c); R18-9-A304; R18-9-A316]

**What kind of system is considered an on-site wastewater treatment facility?** Any conventional septic tank system or alternative system installed at a site to treat and dispose of wastewater, predominantly of human origin, generated at that site. This includes both residential and non-residential systems. On the basis of flow, this includes conventional septic tank systems and alternative systems with a daily design flow up to 24,000 gallons per day.

**When must this Report of Inspection and Notice of Transfer of Ownership be filed and by whom?** Within 15 days after the date of ownership change, this form must be submitted to the applicable county health or environmental agency delegated by ADEQ to administer the department's on-site wastewater treatment facility program (A.A.C. R18-9-A304 and R18-9-A316). Addresses for the delegated county agencies are listed below. The buyer (transferee) is responsible for making sure the form is mailed to the right county agency. Submittal of this completed form authorizes the buyer to continue using the on-site wastewater treatment

facility at the property.

**Is there a filing fee?** In accordance with A.A.C. R18-9-A316(B) and R18-14-102(C) (7) (c), a transfer of ownership fee of \$50 must be submitted with this form to the delegated county agency. The main offices of these agencies are:

### **Apache County**

Environmental Health Department  
75 W. Cleveland  
St. Johns, AZ 85936  
(928) 337-4364

### **Cochise County**

Environmental Health Department  
1415 W. Melody Lane, Bldg. A  
Bisbee, AZ 85603  
(520) 432-9472

### **Coconino County**

Environmental Health Services  
2500 Ft. Valley Road  
Flagstaff, AZ 86001  
(928) 226-2710

### **Gila County**

Environmental Health Department  
621 S. 5th Street  
Globe, AZ 85501  
(928) 425-3189, Ext. 23

### **Graham County**

Health Department  
826 W. Main  
Safford, AZ 85546  
(928) 428-1962

### **Greenlee County**

Health Department  
5th & Leonard Streets  
Clifton, AZ 85533  
(928) 865-2601, Ext. 177

### **LaPaz County**

Health Department  
1112 Joshus Street  
Parker, AZ 85344

(928) 669-1100

### **Maricopa County**

Water and Waste Division  
1001 N. Central Avenue  
Phoenix, AZ 85004  
(602) 506-6676

### **Mohave County**

Environmental Health Department  
318 N. 5th Street  
Kingman, AZ 86402  
(928) 757-0901

### **Navajo County**

Development Services Department  
100 E. Carter Drive  
Holbrook, AZ 86025  
(929) 524-4120

### **Pima County**

Department of Environmental Quality  
130 W. Congress, 3d Floor  
Tucson, AZ 85701  
(520) 740-3340

### **Pinal County**

Environmental Health Department  
31 N. Pinal Street, Bldg. F  
Florence, AZ 85232  
(520) 868-6864

### **Santa Cruz County**

Health Department  
2150 N. Congress Street  
Nogales, AZ 85621  
(520) 761-7800, Ext. 3076

### **Yavapai County**

Environmental Services Unit  
500 S. Marina  
Prescott, AZ 86303  
(928) 771-3151

### **Yuma County**

Environmental Services  
2703 S. Avenue B  
Yuma, AZ 85364  
(928) 329-2290

# Carryback financing with partial releases can inadvertently create subdivisions

by Michael Denious

Land and developers who sell or purchase land through carryback financing with partial release provisions should be wary of the risk of inadvertently creating divisions of land subject to the Arizona subdivision statutes or the unsubdivided land statutes.

A carryback transaction in which a seller initially sells land as five or fewer parcels will often transform the property sold, via partial lot releases to purchasers who resell those lots prior to satisfaction of the carryback loan, into multiples of the initial five-split.

Depending upon the nature of the seller's involvement in negotiating and subsequently executing such releases, the overall transaction may constitute a common promotional plan to divide land into six or more lots or parcels subject to the Subdivided Lands Act, A.R.S. §§ 32-2181 et seq., or the Unsubdivided Lands Act, A.R.S. § 32-2195 et seq.,

The partial release is a common feature in sales of undeveloped land, for which a purchaser must rely upon a carryback loan and subsequent resales to finance the purchase.

In a typical partial release scenario, the seller takes a down payment and a promissory note for the balance, secured by a deed of trust on the land sold, and agrees to release specified lots or acreage from the deed of trust in return for payments by the buyer in addition to principal due. See generally J.R. Kempner, Annotation: Construction of Provision in Real Estate Mortgage, Land Contract, or Other Security Instrument For Release of Separate Parcels Of Land As Payments Are Made, 41 A.L.R.3d 7 (1972). The buyer may then convey the released lot or lots unencumbered by the deed of trust.

It is similar in many respects to a subdivision trust, though under the latter full title remains with the trustee until the purchaser satisfies agreed-upon conditions for conveyance of title. See A.R.S. § 6-801 (10); Hoyle v. Dickinson, 155 Ariz. 277, 279, 746 P.2d 18, 20 (App. 1987); Lane Title & Trust Co. v. Brannan, 103 Ariz. 272, 440 P.2d 105 (1968); G. Carlock, The Subdivision Trust — A Useful Device in Real Estate

Transactions, 5 Ariz.L.Rev. 1 (1963); W. Rehnquist, Subdivision Trusts and the Bankruptcy Act, 3 Ariz.L.Rev. 165, 172 (1961).

In the partial release scenario (as in the subdivision trust scenario), by releasing parts of the whole from the encumbering deed of trust, the trustor and beneficiary (buyer and seller, respectively) are in effect "dividing" or "splitting" the lot from the encumbered portion. Under the deed of trust, the trustee holds bare legal title to the encumbered land and the trustor has equitable title; upon release of the land or a portion thereof, full legal title is conveyed to the trustor/buyer. In many cases separate partial releases are given over time as the buyer makes payments. It is not uncommon, however, for a single release document to release more than one parcel of land, thereby "splitting" a parcel into several separate contiguous lots. In the latter case, the seller risks being implicated as a subdivider.

One might argue that the "release" of the deed of trust does not convey an ownership interest, and therefore does not constitute a division or change in ownership. The distinction between equitable and legal title in a deed of trust arrangement is well-known in Arizona, a "lien" state. See, e.g., Maricopa County v. Superior Ct., 170 Ariz. 248, 254, 823 P.2d 696, 702 (App. 1991); Read v. Arizona Dep't of Revenue, 166 Ariz. 533, 536, 803 P.2d 944, 947 (Tax 1991). As the Arizona Tax Court stated in Read:

In Arizona, the beneficiary of a deed of trust and his trustee do not stand on the same footing as the trustor of such a deed. While the trustee of the deed of trust "holds bare legal title" to the property, the Arizona Supreme Court has said "[n]otwithstanding the conveyance of 'title' in a deed of trust, the trustor remains free to transfer the property and continues to enjoy all other incidents of ownership. 'Read v. Arizona Dep't of Revenue, 166 Ariz. 533, 536, 803 P.2d 944, 947 (Tax 1991) (citations omitted)."

Power to transfer property subject to a deed of trust, however, does not equate to power to sell off a portion of the property without causing the un-

derlying debt to become due (via a due on sale clause); it is the, partial release provision that makes this possible. While a trustor or mortgagor has equitable "ownership" of the encumbered property, he cannot dedicate a road nor effectively subdivide the property unless the mortgagee consents. Lane Title & Trust Co. v. Brannan, 103 Ariz. 272, 440 P.2d 105 (1968).

Courts in outside jurisdictions have recognized that by mortgaging off a portion of land, an owner creates a "split" or "division" of the mortgaged parcel from the surrounding property within the meaning of state subdivision laws. See Orrington v. Pease, 660 A.2d 919 (Me. 1995). In Orrington, the Maine Supreme Court held that mortgaging off a portion of a parcel constituted a division of the parcel for purposes of state subdivision laws, because the interest in the parcel was effectively divided, and the mortgagee bank had the right to foreclose in the event of default. Id., 660 A.2d at 922. Conversely, it stands to reason that releasing a parcel of land in whole or in part from a mortgage or deed of trust "splits" or "divides" it from the encumbered portion. Indeed, under Arizona law a deed of trust, as with a mortgage, conveys an interest in real property (and thus must comply with the statute of frauds and be recorded). See, e.g., Passey v. Great Western Associates 11, 174 Ariz. 420, 424, 850 P.2d 133, 137 (App. 1993).

This is not to say that a seller who agrees to a carryback sale with partial releases is automatically liable for creating a subdivision or unsubdivided lands once the land sold becomes split into six or more parcels. Depending on the circumstances and the specific release provisions, a seller might raise a legitimate defense that, even where the buyer's or buyers' intention is to divide the land for resale, any applicable notice and public report requirements fill upon the buyer or buyers, and not the initial seller. See, e.g., Hagge v. Drew, 165 P.2d 461, 463-64 (Cal. 1945) (*En Banc*) (subdivision of property by purchasers via partial releases did not render initial seller in violation of California subdivided lands act). The seller's liability should be contingent

*Continued on page 16*

## Carryback

*Continued from page 15*

upon a showing that the seller was acting pursuant to a common promotional plan, either individually or in concert with others (e.g., the buyers) to create six or more lots or parcels.

The test as enunciated in *Siler v. Dep't of Real Estate*, 193 Ariz. 374, 380, 972 P.2d 1010, 1016 (App. 1998), rev. denied, is essentially whether the individual or group of individuals is acting according to a plan to divide and offer lots for sale or lease in excess of the number permitted without complying with the notice and public report requirements. See *id.* A seller who has sufficient involvement in facilitating partial releases and subsequent sales may very well run afoul of the subdivided or unsubdivided lands acts.

Examples of involvement by a seller in facilitating subsequent sales through partial releases might include any of the following:

- Significant negotiation of terms of partial lot releases for the specific purpose of facilitating resale of the individual lots for the purpose of financing the initial purchase;
- Engaging in discussions with purchasers regarding potential resales of lots;
- Assisting in development or improvements (e.g., obtaining water or

utilities, or construction of roads) subsequent to closing on the sale;

- Executing releases for specific lots specifically to facilitate sale of the lots to subsequent purchasers;
- Soliciting, or helping to locate, subsequent "downstream" purchasers.

The list of factors above should not be relied upon as automatic taboos, nor should their absence be relied upon as safe harbors. In general, however, developers and their legal counsel should be wary of the potential for inadvertently participating, in a land sale which, though initially a legal land split. (or non-split where sufficient acreage is involved) exempt from public report or platting requirements, may transform via subsequent sales into a common promotional plan to divide land within the scope of the Subdivided Lands Act or the Unsubdivided Lands Act.

Where sellers are careful to minimize their involvement in subsequent land splits or sales, and/or are able to demonstrate that any public reporting or platting requirements were specifically contemplated to be borne by the purchasers, they will be best equipped to avoid being implicated in an unlawful lot-splitting scheme.

To summarize, careless use of partial releases may transform a well-meaning land developer into an inadvertent subdivider or "unsubdivider" within the scope of the Arizona

statutes relating to subdivided, and unsubdivided lands. While such releases are not inherently improper or illegal, they, tend to show a seller's involvement in facilitating additional sales or splits of land subsequent to the initial sale. This in turn affects the seller's ability to insulate him- or herself from being implicated in future development and sales. Developers may consider consulting with legal counsel and reviewing proposed sales of land where partial releases are to be used, whether in small or very large land deals, to minimize any risk of ultimately falling into a common promotional plan subject to the Subdivided or Unsubdivided Lands Acts.

*Mr. Denious is an associate with the law firm of Stoops & Kloberdanz, PLC, and practices general real estate litigation. Prior to joining Stoops & Kloberdanz, Mr. Denious was an Assistant Attorney General with the Arizona Attorney General's Office, where he represented the Arizona Department of Real Estate, the Arizona Department Of Insurance, and the Arizona State Banking Department. He has previously authored an article regarding barriers and common promotional plans under the Subdivided Lands Act, published in the Spring 2001 edition, of The Real Estate Journal published by the State Bar.*

# ARIZONA

## REAL ESTATE BULLETIN

Arizona Department of Real Estate  
2910 N 44th Street, Phoenix AZ 85018-7256